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in the

Supreme Court

of the

United States

OCTOBER TERM, 1975

NO. 75-3221

LOUIS VERNELL, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

LOUIS VERNELL, Jr., Pro Se
100 S. E. Second Street
Miami, Florida 33131

MIAMI REVIEW — 371-4853 — 377-3721

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---

The Petitioner, Louis Vernell, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals Fifth Circuit, entered on February 25, 1975.

OPINION BELOW

The Decision/Judgment of the Court of Appeals (Appendix A) affirming the judgment of conviction is reported at 510 F.2d 383.

JURISDICTION

The judgment of the Court of Appeals was originally entered on February 25, 1975 and thereafter reissued by such Court on July 7, 1975.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Jurisdiction is also invoked under Rule 19(1)(b) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the element of "wilfulness" has different meaning when applied to acts of *om*ission as proscribed by 26 U.S.C. Section 7203, and acts of *com*mission as proscribed by 26 U.S.C. Sections 7201, 7206 and 7207, so as to require only proof of a specific intent to disregard the law by failing to file timely tax returns.

2. Whether a fatal variance, sufficient to preclude a conviction, results where, in a prosecution under 26 U.S.C. Section 7203, the Information charges the failure to file required returns on or before the specific date of April 15 of the subject years and the proof adduced reflects that, by reason of applications made by the Peti-

tioner/Taxpayer, the time for such filings were, as a matter of law, extended to dates subsequent to April 15th of each of such years.

RULES AND STATUTES INVOLVED

(1) Title 28, U.S.C. Section 1254(1)

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

(2) Rule 19(1)(b) Rules of Supreme Court of the United States

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

(3) Title 26, U.S.C. Section 7203

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT

Petitioner, a practicing attorney for 25 years, was convicted after jury trial in the United States District Court for the Southern District of Florida, of the offense(s) of wilfull failure tc file income tax returns for the taxable years 1967 through 1971, as proscribed by 26 U.S.C. Section 7203. Upon adjudication, Petitioner was sentenced to concurrent terms of 9 months imprisonment and fined $5,000.

Prior to trial, the parties stipulated to all elements of the offense charged save for issue of wilfulness. To negate such singular element, the Petitioner evidenced during trial proceedings:

(1) That almost a year prior to the initiation of charges, Petitioner filed all of the subject tax returns and fully paid all taxes due thereon,

(2) That during each of the subject years, the Petitioner had made timely applications for extensions of time to file such returns, and that with one exception, all such applications were granted.[1] (App. F).

(3) That a myriad of circumstances precluded an earlier filing of Petitioner's returns which included the loss and destruction of Petitioner's records; the ill health and repeated "intensive care" hospitalizations of Petitioner's wife; Petitioner's own deteriorated health; his absence from the country; and other matters related to the pressure and requirements of Petitioner's law practice.

In light of such matters and theory of defense, the Petitioner requested the trial court to supplement its charge on the element of wilfullness so as to conform to the requirements enunciated by this Honorable Court in *Bishop vs. United States*, 412 U.S. 346.[2] (App. D)

---

[1]At trial, the Government conceded virtually all factual matters presented in Petitioner's defense with the exception of Petitioner's claim with respect to such filings, which it vigorously denied. During subsequent process of appeal, however, it was discovered that, to support its denial, the Government not only suppressed evidence, but placed in the record false testimony and records.

[2]The Petitioner requested the inclusion of the following supplementary charge to the jury which was denied by the trial court.

"Before you can find the defendant guilty, it must be proved beyond a reasonable doubt that the defendant willfully failed to file the return, income tax returns involved herein, and the word 'wilfully" means to act or, in this case, the failure to act was done with bad faith or evil intent."

The trial court however, expressly rejected the applicability of *Bishop* with respect to acts of Omission as charged in the case at bar and determined that the mandates of such case were referable only to felonies and acts of *com*mission. (App. G). Accordingly and with respect to the purported omission of Petitioner in failing to file, the trial court's charge to the jury (sustained by the Fifth Circuit) required only a specific intent to disregard or disobey the law.[3] (App. E)

The Fifth Circuit Court of Appeals in a per curiam decision rendered without opinion, sustained the charge of wilfullness as given by the trial court and therein further rejected Petitioner's claim as to the fatal variance which occurred as a result of the information charging the commission of the subject offenses by the specific date of April 15th, whereas the proof adduced reflected different and extended dates for the lawful filing of Petitioner's returns.

---

[3]In its charge, the trial court distinguished the requirements of wilfullness when applied to acts of commission and acts of omission. With respect to the former, the trial court included as a necessary element, a "bad purpose" either to disobey or disregard the law. Such court however, fully excluded any reference to either purpose, intent or motive in its charge as to crimes and acts of omission, viz:

> ". . . an omission or failure to perform an act required by the law is willful if the defendant knew the act was required by the law, and if the defendant voluntarily and intentionally and without justifiable cause failed to perform the legally required act, that is to say, the nonperformance of the required act resulted from a specific intent on the part of the defendant to disobey or to disregard the law in question."

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals in sustaining the trial Court's determination and charge with respect to the element of wilfulness is in conflict with this Court's decision in *Bishop vs. U.S.*, 412 U.S. 346 and with the decisions of other Courts of Appeal. Although this Honorable Court seemingly sought to resolve in the *Bishop* case, any confusion in defining the term "wilfullness" as applied to tax related statutes, the ensuing decisions rendered by the several Circuit Courts of Appeal continue to reflect almost irreconcilable conflict and diametrically opposed decisions with respect thereto.

Such resulting divergence of opinion is especially noted where the subject offenses circumscribe acts of omission and failure to perform a legal duty as in Title 26, U.S.C. Section 7203.

Although in *Bishop*, this Honorable Court specifically interpreted and defined "wilfully" as having the same meaning when applied to the various acts of commission as proscribed by Sections 7206(1) and 7207, it is submitted that this Court's opinion was nonetheless intended to have much broader application, especially where the Court employed the following language (at 361):

> "Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "wilfully", the bad purpose or evil motive described in Murdock, supra."

In considering such uniform requirements and definition of "wilfullness" this Court specifically held (at 361):

> "The Court, in fact, has recognized that the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent", Murdock, 290 U.S. 398, 78 L.Ed. 381, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," Spies, 317 U.S. at 498, 87 L.Ed. 418, or knowledge that the taxpayer "should have reported more income than he did." Sansone, 280 U.S. at 358, L.Ed.2d 882. See *James v. United States*, 366 U.S. 213, 221, 6 L.Ed.2d 246, 81 S.Ct. 1052 (1961); *McCarthy v. United States*, 394 U.S. 459, 471, 22 L.Ed.2d. 418, 89 S.Ct. 1166 (1929). This long standing interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes."

The 9th Circuit Court of Appeals, in *U.S. vs. Hawk*, (9th Cir. 1974) 497 F.2d 365, rejected the applicability of *Bishop* when applied to a Section 7203 offense, reasoning (at 366):

> "... The reason *Bishop* does not compel inclusion of the term 'evil motive' is much simpler: an issue concerning the necessity of employing that language was not presented in *Bishop*. The Court was confronted only with the permissibility of the two-level definition of willfulness, and beyond

> that nothing in the case related to the precise form of words necessary to convey the meaning of willfulness."

In so determining, such court held that the inclusion of "bad purpose," evil motive" or like expressions were unnecessary in defining "willfully" and that only a specific intention not to file returns which the defendant knew ought to be filed was required. Presumptively, the Court concluded: "This, we think, was all that Murdock-and Bishop—meant by the use of the term."

In the later case of *Cooley v. U.S.* (9th Cir. 1974) 501 F.2d 549, the same court approved as being "in substantial compliance with the Bishop Court's requirement," its earlier pronouncement in *Hawk*, supra.

Conversely, the 8th Circuit Court of Appeals in *U.S. vs. Pohlman* (8th Cir. 1975) 510 F.2d 414, reversed a conviction entered where the trial court failed to include the elements of bad purpose or evil motive in its instruction on wilfullness, and in alluding to *U.S. vs. Murdock*, 290 U.S. 389 (1933), such court held:

> "... However, the court prefaces this meaning by saying that 'willfully' also means doing something 'deliberately and intentionally, and without justifiable excuse'. Yet early in *Murdock* the Supreme Court observed that one who acts deliberately and intentionally and without legal justification must still be found not guilty if he did not possess, *in addition*, a state of mind which manifested a bad purpose or evil motive to violate the law. *Murdock*, at 397-98."

The Court, in such instance, went on to say:

"Their verdict could have resulted from a belief that, although this was the reason, it was not justifiable under the law. As discussed, more is required to be culpable under the statute. The jury must find that her failure to file arose from a bad motive and evil intent to commit an illegal act, fully aware of her legal obligation to do otherwise.

Since bad purpose and evil motive are essential elements of willfulness under Section 7203, we see no reason that the jury should be afforded the ambiguity of an instruction which possibly denotes otherwise. If these are essential elements of the misdemeanor the jury should be told so in plain and unambiguous terms. As this court reaffirmed in *United States v. Achtenberg*, 459 F.2d 91 (8th Cir.) cert. denied, 409 U.S. 932 (1972):

> 'Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly set forth with sufficient clarity to permit the jury to perform its duty intelligently. Id. at 97, quoting from *Jackson v. United States*, 348 F.2d 774 (D.C. Cir. 1965).' "

The opposite conclusion was reached by the 3rd Circuit Court of Appeals in *U.S. vs. Greenlee*, 1975-1 USTC, 1968, ____ F.2d ____, which determined that, notwith-

standing the pronouncement in *Bishop* and *Murdock*, only "a specific intent which the law forbids" was required.

Doubtless, the clearest example of the existing conflict and divergence of opinion is reflected in the two contrary decisions rendered by the 7th Circuit Court of Appeals in *U.S. vs. McCorkle, Jr.* In its original opinion reported in 511 F.2d 477, such court reversed a conviction entered on almost the identical charge given in the case at bar, holding:

> "The above instructions required a mere finding of an intention not to file returns without more. The Court explicitly directed that it need not concern itself with whether the defendant intended to defraud the Government. Moreover, the court's instructions had the effect of eliminating justifiable excuse as a consideration in resolving the issue of willfulness. The instructions failed to properly charge the jury on the element of willfulness."

Upon rehearing, the same court retracted from its earlier opinion and affirmed the conviction in a subsequent decision reported in 511 F.2d 482, holding that willfulness under a Section 7203 prosecution required only the "intentional failure to file and knowledge by the defendant that he was under a legal obligation to do so."

Although the 5th Circuit Court of Appeals in *U.S. v. Tunnell*, (5th Cir. 1973) 481 F.2d 149, held that "evil motive" was a necessary element for conviction in a Section 7201 offense, it has not, except in the case at bar. directly addressed itself to the requirements of wilfull-

ness as applied to a Section 7203 offense. However, in affirming the determinations and charge given by the trial court in the case sub judice, which required only specific intent, the decision of the lower court is in clear conflict with the decisions rendered by this Court in *Bishop* and *Murdock* and with the decisions rendered by the 8th Circuit Court of Appeals in *U.S. vs. Pohlman*, supra, and *U.S. vs. Benginina*, (8th Cir. 1974) 499 F.2d 117.

It is accordingly clear from the foregoing, that the Courts of Appeal for the 5th, 7th and 9th Circuits have defined wilfullness in a manner which requires dual standards when applied to tax related statutes reflective of acts of *com*mission and those reflective of acts of *om*ission. Certainly, the culpability of one who merely fails to perform an act cannot be considered greater than one who intentionally *com*mits an act prohibited by law. Ergo, the application of such divergent requirements are repugnant to the pronouncements made by this Honorable Court in *Bishop*, where it was stated (at 361).

> "The Court's consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."

It is submitted that there is neither rationable nor appropriate predicate in denoting different volitional elements in defining wilfullness and that the clearly-drawn lines of demarcation reflecting such a double standard should be finally brought together and the existing conflict resolved by this Honorable Court.

2. The decision of the 5th Circuit Court of Appeals in the case at bar is otherwise in conflict with the decision of the United States Court of Appeals for the 3rd Circuit on the question of whether a fatal variance exists between the crime(s) charged in the Information and the proof adduced at trial.

Specifically, the Information in the case sub judice charged the Petitioner with the failure to file his tax returns "on or before April 15" of each year following the taxable years 1967-1971. At no time was such Information ever amended, nor request therefor made by the Government.

The proof adduced at trial reflected that during each of the taxable years in question, the Petitioner had made due and timely application for an extension of time to file the subject returns and that, except for one instance, such applications were granted. Albeit, such applications, whether granted or not, served to effectively and lawfully extend the time within which the Petitioner was otherwise required to file the subject returns to dates well beyond April 15th.[4]

In *United States vs. Goldstein*, (3rd Cir. 1974) 502 F.2d 526, the 3rd Circuit Court of Appeals dealt precisely with the issue and determined that the same variance considered in the case at bar was fatal and otherwise sufficient to vitiate the conviction entered. In *Goldstein* the Defendant was charged with failure to file a return for the

[4]The record reflects, and existing procedure requires, that even where an application for extension of time is denied, the time within which such return is required to be filed is automatically extended for a period of ten days following such denial.

taxable year 1965 on or before April 15, 1966. The evidence reflected that on April 15, 1966 he made application for extension of time to file the subject return; such application was, however, "rejected" on April 27, 1966. The Court in such case, added to the date of April 15, 1966 the automatic ten-day extension of time resultant from the "rejection" to establish that no duty existed on the part of the Defendant to file his return before May 7, 1966. Notwithstanding, the Defendant in such case failed to file his return by May 7, 1966 and even as of time of trial, still had not filed his return. In determining that the variance which existed between the date charged and that proven comprised *a matter of substance*, the Court in such instance held:

> "Ordinarily, a mere change in dates is not considered a substantial variation in an indictment, but an exception exists when a particular day may be made material by the statute creating the offense. As stated in 4 Anderson, Wharton's Criminal Law and Procedure Section 1775, 'when time is of the essence of the offense it must be correctly alleged and must be proved as laid . . .' (footnote omitted). 'As has been previously stated, when time is an essential ingredient of the offense charged, it must be laid with exactitude in an indictment, and in such cases must be proved as laid'. 5 Id Section 2062. (footnote omitted).
> The Statute involved here illustrates this exception to the general rule. There was no duty imposed on the Defendant to file a return before April 15, and an indictment alleging an offense in failing to submit a return on April 10, for example, would not state a crime. An omission to

> perform an act by April 15 is designated a criminal offense, but only on that date does the crime occur. Conduct and time are thus inextricably intertwined. See *United States v. Figuerell*, 462 F.2d 1080 (3rd Cir. 1972).
>
> By way of contrast, a bank robbery is a criminal offense at all times, regardless of the date on which it takes place. In the instance of variance of a few days between the dates established by the indictment and proof would be a matter of form and not of substance. The difference between these two situations is apparent."

While substantively, the case at bar is identical with the *Goldstein* case, it should be noted that procedurally the charge in the Goldstein case was founded in an indictment, whereas in the case sub judice the charge was prosecuted under an Information. In *Goldstein*, the court would not permit an amendment; in the instant case, no amendment was ever sought or otherwise granted by the Court.

Although a similar issue of variance was collaterally considered by the 6th Circuit Court of Appeals in a prior decision rendered in *United States v. Doelker*, (6th Cir. 1964) 327 F.2d 343, the Court in *Goldstein* specifically noted in footnote as follows:

> "Cf. United States v. Doelker, 327 F.2d 343, (6th Cir. 1964). There, the question of amendment was not raised in the trial court, and the holding that the variance was not substantial must be considered dictum. Furthermore, in that case, an ex-

tension had been granted to a specified date, and there could be no question of the knowledge of the defendant as to the correct time for filing."

Accordingly, absent any other appellate decisions on the issue, it is submitted that the tenets of *Goldstein* are controlling and that the resulting conflict with the decision rendered by the 5th Circuit in the case at bar should be resolved by this Honorable Court.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS VERNELL, JR., Pro Se
100 S. E. Second Street
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari, and annexed Appendix were mailed to the office of the Solicitor General, Department of Justice, Washington, D. C. 20530, on this ____ day of August, 1975.

LOUIS VERNELL, JR., Pro Se
100 S. E. Second Street
Miami, Florida 33131

APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 74-3351
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOUIS VERNELL, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(February 25, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judge.

PER CURIAM: IT IS ORDERED that appellant's motion for leave to supplement the appendix is GRANTED.

AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 73-245-Cr-J-S
(26 USC 7203)

UNITED STATES OF AMERICA
vs.
LOUIS VERNELL, JR.

[Filed December 12, 1973]

INFORMATION

The United States Attorney charges:

COUNT ONE

That during the calendar year 1967, the defendant, LOUIS VERNELL, JR., who was a resident of the City of North Miami Beach, State of Florida, had and received a gross income of $72,826.23; that by reason of such income he was required by law, following the close of the calendar year 1967 and on or before April 15, 1968, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, at Jacksonville, in the Middle District of Florida, or to the Director, Internal Revenue Service Center, Chamblee, Georgia, stating specifically the items of

his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code, Title 26, United States Code, Section 7203.

COUNT TWO

That during the calendar year 1968, the defendant, LOUIS VERNELL, JR., who was a resident of the City of North Miami Beach, State of Florida, had and received a gross income of $42,086.18; that by reason of such income he was required by law, following the close of the calendar year 1968 and on or before April 15, 1969, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, at Jacksonville, in the Middle District of Florida, or to the Director, Internal Revenue Service Center, Chamblee, Georgia, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code, Title 26, United States Code, Section 7203.

COUNT THREE

That during the calendar year, 1969, the defendant, LOUIS VERNELL, JR., who was a resident of the City of North Miami Beach, State of Florida, had and received a gross income of $34,275.48; that by reason of such income he was required by law, following the close of the calendar year 1969 and on or before April 15, 1970, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, at Jacksonville, in the Middle District of Florida, or to the Director, Internal Revenue Service Center, Chamblee, Georgia, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any proper officer of the United States.

In violation of Section 7203, Internal Revenue Code, Title 26, United States Code, Section 7203.

COUNT FOUR

That during the calendar year 1970, the defendant, LOUIS VERNELL, JR., who was a resident of the City of North Miami Beach, State of Florida, had and received a gross income of $50,774.34; that by reason of such income he was required by law, following the close of the calendar year 1970 and on or before April 15, 1971, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of

Jacksonville, at Jacksonville, in the Middle District of Florida, or to the Director, Internal Revenue Service Center, Chamblee, Georgia, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code, Title 26, United States Code, Section 7203.

COUNT FIVE

That during the calendar year 1971, the defendant, LOUIS VERNELL, JR., who was a resident of the City of North Miami Beach, State of Florida, had and received a gross income of $44,774.65; that by reason of such income he was required by law, following the close of the calendar year 1971 and on or before April 15, 1972, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, at Jacksonville, in the Middle District of Florida, or to the Director, Internal Revenue Service Center, Chamblee, Georgia, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code, Title 26, United States Code, Section 7203.

JOHN L. BRIGGS
United States Attorney

By /s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
Assistant United States Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

No. 74-79-Cr-CF

UNITED STATES OF AMERICA
vs.
LOUIS VERNELL, JR.

[Filed July 18, 1974]

On this 18th day of July, 1974 came the attorney for the government and the defendant appeared in person and[1] by E. David Rosen, Esq., Counsel,

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty has been convicted of the offense of wilfully and knowingly failing to make income tax returns to the District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States; in violation of Section 7203, Internal Revenue Code, Title 26, United States Code, Section 7203, as charged[3] in the Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] NINE (9) MONTHS or until otherwise discharged by due process of law as to each of Counts 1, 2, 3, 4, and 5, sentences of confinement to run concurrently with each other, it being further

ORDERED and ADJUDGED that as to Count I, in addition to the terms of imprisonment hereinabove imposed, the defendant shall pay a fine unto the United States of America in the sum of $5,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to[5]

/s/ Charles B. Fulton

Chief, United States District Judge

Clerk

APPENDIX D

Defendant's requested charge to the Jury on the issue of wilfulness:

Before you can find the defendant guilty, it must be proved beyond a reasonable doubt that the defendant wilfully failed to file the return, income tax returns in-

volved herein, and the word "wilfully" means to act or, in this case, the failure to act was done with bad faith or evil intent.

APPENDIX E

The Trial Court's instruction to the Jury on the issue of wilfullness:

The word "wilfully" as used in this statute and in this information, means a voluntary and intentional violation of a known legal duty. Therefore, an act is done wilfully if it is done knowingly, voluntarily, and intentionally, and with the specific intent to do something which the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

Conversely, an omission or failure to perform an act required by the law is willful if the defendant knew the act was required by the law, and if the defendant voluntarily and intentionally and without justifiable cause failed to perform the legally required act, that is to say, the nonperforance of the required act resulted from a specific intent on the part of the defendant to disobey or to disregard the law in question.

APPENDIX F

TESTIMONY OF PETITIONER

Q Now, you heard the testimony of Mr. McDaniel?
A Yes, sir.

Q Have you examined Government Exhibit No. 1—No. 8?
A Relative to my extension applications?

Q Yes, sir.
A Yes.

Q They don't show that you filed extensions for all those years, do they?
A They are incorrect.

Q You believe they are incorrect?
A I know they are incorrect.

Q What years did you file extensions for, sir?
A I filed extensions for 1967, 1968, 1969, 1970, and 1971.

Q You, yourself, or an accountant?
A Either myself or the accountant, one or the two.

Q And do you recall which one?
A There were some years I filed it and some years he filed it in my behalf.

Q Who is "he?"

APPENDIX G

THE COURT: Well, I want the record to show that I gave the same charge that I have given for eleven years, in hundreds and hundreds of cases in this court, that I am a "creature of habit."

Now, there was another objection that you had and that was to my disinclination, in fact refusal, to use the words "evil intent" or "evil purpose."

MR. ROSEN: Yes, Your Honor.

THE COURT: And that's been noted, but for the appellate court and so that the record will convey to whoever the panel is that reviews this, to me the word "evil" means morally corrupt. It imputes bad character expressly or by inference, and I think that I would have no hesitation in using those words in a 7201 case where there was a charge of willfully attempting to avoid and defeat the payment of income taxes, or in a 7206 or 7, which are the statutes that really are fraud statutes, either to make a false statement under oath or to distribute or convey one that you knew to be false; but this matter of failing to file an income tax return, in my opinion, is one that can be better charged the way I charged it than to use the words "evil intent" or "evil purpose," because that word "evil" to me means what I said it meant, and, incidentally, I took my definition from Webster.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-322

LOUIS VERNELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of willful failure to file income tax returns for the years 1967 through 1971, in violation of 26 U.S.C. 7203. He was sentenced to concurrent nine-month sentences and fined $5,000 (Pet. App. C 7-8).[1] The court of appeals affirmed (Pet. App. A).

[1] "R." refers to the original record filed in the court of appeals.

The pertinent facts are as follows: Petitioner stipulated that he was required by law to file income tax returns for each of the years; that he did not do so until May 1973, after the Treasury agents' investigation had begun; and that his gross income was substantially that charged for each year, *i.e.*, $72,826 in 1967, $42,086 in 1968, $34,275 in 1969, $50,774 in 1970, and $44,774 in 1971 (R. 29, 47, 74; Pet. App. B 2-6). During the investigation petitioner advised the agents that he had been too busy trying to make money to file the returns (R. 59, 61). At trial, petitioner testified that he had practiced law for 23 years and that he had not filed his tax returns on time because he had been too busy in his law practice (R. 112, 115-116, 121).

1. Petitioner contends that the trial court erred in instructing the jury as to willfulness. The trial court instructed the jury as follows (R. 230-231):

> The word "willfully," as used in this statute and in this information, means a voluntary and intentional violation of a known legal duty. Therefore, an act is done willfully if it is done knowingly, voluntarily and intentionally, and with the specific intent to do something which the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.
>
> Conversely, an omission or failure to perform an act required by the law is willful if the defendant knew the act was required by the law, and if the defendant voluntarily and intentionally and without justifiable cause failed to perform the legally required act, that is to say, the

> nonperformance of the required act resulted from a specific intent on the part of the defendant to disobey or to disregard the law in question.

Petitioner argues (Pet. 7-12) that this instruction conflicts with *United States* v. *Bishop*, 412 U.S. 346; *United States* v. *Murdock*, 290 U.S. 389; and *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8). In *Bishop*, this Court held that the word "willful" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). The instruction of the trial court is in complete accord with the *Bishop* definition of "willful." Nothing in that case requires that the trial court employ any particular words in its instructions to the jury on willfulness.

Similarly, the trial court's instruction does not conflict with *United States* v. *Murdock*, 290 U.S. 389. There the defendant was charged with willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give requested information was based upon his *bona fide*, though mistaken, understanding of his constitutional protection against self-incrimination. Since the scope of the privilege was uncertain at the time of the defendant's refusal to supply the requested information, the Court held that the defendant was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was

applicable. While the Court in *Murdock* formulated the requirement of willfulness in terms of "bad faith or evil intent" (290 U.S. at 398), nothing in that case requires that the trial court employ those precise words in its instructions to the jury. As the Court pointed out in *Bishop* (412 U.S. at 360-361), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard applied by the trial court in this case. Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361). See also *Cooley* v. *United States*, 501 F. 2d 1249, 1253, n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *Hawk*, 497 F. 2d 365 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *Matosky*, 421 F. 2d 410, 412 (C.A. 7), certiorari denied, 398 U.S. 904; *Lumetta* v. *United States*, 362 F. 2d 644 (C.A. 8).

Finally, the panel decision in *United States* v. *Pohlman*, 510 F. 2d 414 (C.A. 8), relied upon by petitioner, was reversed by the court *en banc*, which held that the "trial court's instruction on willfulness * * * fairly and adequately charged the jury as to what the Government had to establish to support a conviction." *United States* v. *Pohlman*, No. 74-1759, decided August 27, 1975, slip op. 7, petition for a writ of certiorari pending, No. 75-483.

2. Petitioner further argues (Pet. 13-16) that there was a variance between the information and the proof concerning the time his tax returns were

due. The information alleged that the due date was April 15 of each year. Petitioner urges, however, that the evidence established that he had requested extensions for each year. Apart from the fact that petitioner did not raise this point at trial when the information could have been amended to take into account any requested extensions (see Rule 7(e) of the Federal Rules of Criminal Procedure), petitioner stipulated that he had not filed the returns at issue (R. 29). That admission makes the alleged variance irrelevant.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-322

LOUIS VERNELL, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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RESPONSE TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

LOUIS VERNELL, JR., Pro Se
100 S. E. Second Street
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MIAMI REVIEW — 371-4853 — 377-3721

in the
Supreme Court
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RESPONSE TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

In its Memorandum, the Government has apparently deemed it expedient to not only restate the facts, but to otherwise and unnecessarily, mis-state the same. Indeed, were the facts as represented by the Government, the Petitioner would *never* have proceeded with either his original appeal or with the Petition filed herein.

It is submitted, however, that properly presented, the facts in the case at bar appropriately bespeak the issue(s) raised in the petition filed and affirmatively demonstrate the constitutional infirmities of Petitioner's conviction.

Significantly, the record reflects the presence of at least two matters which, per se, could reasonably be regarded as sufficient to *negate* the charge of "wilfull" failure to file returns, i.e.:

> (1) That all of the subject returns were, in fact, filed, with taxes fully paid thereon, almost a year prior to the filing of Information (contrary to the Government's statement, the Petitioner never stipulated that his returns were filed "after the Treasury agents investigation had begun" (Page 2 of the Government's Memorandum). Indeed, the filing of Defendant's returns had nothing to do with the so-called "investigation").
>
> (2) During each of the subject years, the Petitioner made applications for extensions to file the required return(s) and except in one instance, the same were granted. (If, in fact, it ever was the intention of Petitioner to escape the necessity of filing, he would certainly not have sought additional time to do so and thereby "invite" closer scrutiny as to his tax status).

As reflected in the record, however, the situation presented in the case at bar is one of "*late*" filing, rather than "*non*"-filing. The record otherwise demonstrates a myriad of reasons and circumstances which could reason-

ably justify such "late" filing, i.e.: the repeated hospitalizations of Defendant's wife in "intensive care" facilities (T. 119); the loss and destruction of Defendant's records (T. 131, 133); Defendant's own ill health and hospitalization (T. 138); Defendant's extensive absence from the country (T. 147); the frequent relocations of Defendant's business (T. 132) and the pressures consequent to a 12-hour day, 7-day week practice (T. 116, 189-199).

In erroneously "condensing" the foregoing matters, the Government suggests in its Memorandum only *one* reason as appearing in the record for Petitioner's untimely filing of returns, i.e., that Petitioner "had been too busy trying to make money." The record reflects that such statement was not only contradicted by the Government witness presenting the same, but was further denied by the Petitioner as well. Further error in the Government's recitation of facts is reflected in its reference to the stipulation entered into prior to commencement of trial. Although the Government suggests that the Defendant had stipulated that he had *never* filed his returns, the record reflects that such stipulation referred only to his non-filing within the time specified in the Information. At all times during trial, the Government fully *acknowledged* the prior filing of all of Petitioner's tax returns and the payment in full of all taxes due thereon.

Albeit, one could not reasonably conclude from a proper recitation of the facts as evidenced in the record that the Defendant is a criminal, or that such facts would necessarily compel an adjudication of guilt as to the offense(s) charged.

It is significant to note that the statute circumscribing the subject offense, i.e., 26 U.S.C. 7203 prescribes that "wilfullness" is a necessary element thereof. In utter disregard of such statutory requirement, the Government's argument would necessarily require a change in the statute and in the place and stead of "wilfullness" the Government would substitute "intentional" as a requirement; such suggested change however, is a matter properly relegated to the Legislative rather than to the Judicial branch of Government.

Needless to state, there are a vast number of criminal statutes which do, in fact, require that a proscribed act be committed "with intent" or "intentionally". The tax related statutes, however, are explicit in their requirement of "wilfullness" as distinguished from "intention".

In recognizing such distinction, both this Honorable Court and the several Circuit Courts of Appeal have for the most part consistently required more than mere intent to sustain a tax conviction and have additionally required an element of mens rea. In *Bishop vs. U.S.*, (1973) 412 U.S. 346, L.Ed. 141, this court held, id at page 361:

> "The Court's consistent interpretation of the word "willfully" to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers,"

Earlier, in *United States v. Murdock*, (1933) 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381, this Court formulated the requirement of wilfullness as "bad faith or evil intent".

In *Spies vs. United States*, 317 U.S. 492, 87 L.Ed. 418, 63 S.Ct. 364 (1943), this Court alluded to the expression "evil motive" in defining "wilfullness".

In like fashion, the courts of appeal have on innumerable occasions reflected similarly upon, and otherwise required, evil motive, bad faith, evil intent or other like expressions as an addition to the element of "intent" when defining wilfullness. *United States v Bengimina*, (8th Cir. 1974) 499 F.2d 117, *United States v. Klee*, 494 F.2d 398, *United States v. Vitiello*, (3rd Cir. 1966) 363 F.2d 240, *United States v. Palermo* (3rd Cir. 1958) 259 F.2d 872, *United States v. Mitchell*, 495 F.2d 285 (4th Cir. 1974), and *United States v. Tunnell*, (2nd Cir. 1973) 481 F.2d 149.

In *Mitchell*, (supra) the 4th Circuit Court of Appeals stated:

> "In so concluding, the court held that the 'instruction should have been granted since the crime charged required proof of willfulness — an element of fraud or bad faith.' "

Similarly, the 2nd Circuit Court of Appeals, in *Tunnell*, held:

> "As inferred by the Supreme Court from the words 'wilfully attempts' in the statute, the second and third necessary elements for conviction are evil motive by the defendant Tunnell and an affirmative act to carry out his scheme to evade tax. See 26 U.S.C. Sec. 7201 (1970); Spies v United States, 317 U.S. 492, 63 S.Ct. 364, 87

L.Ed. 418 (1943). See generally United States vs. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed. 2d 941 (1973)."

It is submitted that in order to sustain the argument of the Government in the case at bar, this Court would necessarily be required to approve the instruction given by the trial court which merely required the element of intent. Indeed, in utilizing such instruction, the trial judge specifically noted in the record that he was rejecting the pronouncements made by this Court in *Bishop* (T. 240-241).

Yet, and if nothing else, the Government's Memorandum serves to reflect the vital need for this Court to grant Certiorari in the within cause. It is accordingly noted that the Government has brought to the attention of the Court and this writer, the *en banc* decision of the 8th Circuit Court of Appeals which receded from its earlier decision which required reversal of the conviction entered.

Conflict is therefore apparent not only *between* the Circuits but *within* the circuits as well. *United States v. McCorkle*, (7th Cir. 1975) 511 F.2d 577, in which the 7th Circuit Court of Appeals originally reversed the conviction entered, only to recede therefrom in 511 F.2d 482; *United States v. Pohlman*, 510 F.2d 414, in which the 8th Circuit Court of Appeals, sitting en banc, similarly reversed the conviction and later receded from such decision while sitting en banc. 36 AFTR 2d 75-5642.

Clearly, in light of the foregoing, it would be difficult, if not impossible to present before this Honorable Court any similar matter of constitutional magnitude which

could reflect greater conflict or which could be more deserving of decisive attention by this Honorable Court.

In applying such principles to the case at bar, it is noted that the Information filed herein charges Petitioner with having failed to file on or before the specific date of April 15th during each of the subject years, whereas and by reason of the various applications made by Petitioner to extend the time for filing, there was, in fact, no lawful requirement that any of the subject returns be filed by such date. In this regard, the decision of *United States v. Goldstein*, (3rd Cir. 1974), 502 F.2d 526, 528, 530, (which is totally ignored in the Government's Memorandum), is deemed to be controlling.

Notwithstanding, the Government suggests that this Court should not consider such clear variance because of the erroneous interpretation placed by it on the stipulation entered into between the parties at trial and for the further suggested reason that the Petitioner did not provide the Government with an opportunity to amend the Information. Certainly, it is not the responsibility of one who is accused of a crime to do more than defend the specific charge made against him. However, the invalidity of such argument is further apparent in the record which reflects that the Defendant did, in fact, move for a judgment of acquittal on the specific ground of variance in the trial court prior to any appeal being taken (T. 27).

Although the facts in *United States vs. Figurell* (3rd Cir. 1972) 462 F.2d 1080 are conceded to be dissimilar to those present in the case at bar, nonetheless the principle of law is submitted as being the same. In *Figurell*, the 3rd Circuit Court of Appeals held that where time is a

specific element of the offense charged, a conviction could not be supported by showing the commission of such offense at a later date. Such principle was further considered and affirmed in *United States v. Richmond* (USDC 1961) 190 F.S. 889.

It is clear from the foregoing that the Government did not prove the specific offense(s) which it charged against the Petitioner in the Information. In accordingly deeming that the variance present in the case at bar cannot constitutionally support the conviction entered, the Petitioner prays that the same be vacated.

The Government's response to the second question raised by Petitioner is likewise deemed inappropriate. Indeed, the same constitutes virtually no response and wholly fails to address itself to the constitutional issues involved.

Notwithstanding that the government "glossed" over such question it is submitted to be a basic and fundamental part of due process and our system of justice that a conviction can only be entered upon evidence which supports the charge made. Ergo, a conviction cannot stand where the evidence adduced at trial does not support the particular offense charged.

In *Thompson vs. Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, this Honorable Court reflected upon the basic prerequisites of a conviction as follows:

> "Just as conviction upon a charge not made would be sheer denial of due process, so it is a violation of due process to convict and punish a man without evidence of his guilt."

Such principle was reaffirmed by this Honorable Court in *Johnson vs. Florida*, 391 U.S. 596, 88 S.Ct. 1713 (1968) and again in *Gregory vs. City of Chicago*, 394 U.S. 111, 22 L.Ed.2d 134, 89 S.Ct. 946. In the *Gregory* case, this Honorable Court, speaking through Chief Justice Warren, held:

> "As we said in *Garner vs. Louisiana*, 368 U.S. 157, 164, 82 S.Ct. 248, 251, 7 L.Ed.2d 207 (1961):
>
> It is as much a denial of due process to send an accused to prison following a conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."

CONCLUSION

It is submitted that the Government has failed to suggest a lawful argument which could serve to preclude the proper granting of the Petition for Writ of Certiorari filed in the within cause. For the reasons herein and previously stated, it is urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

LOUIS VERNELL, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above was mailed this ____ day of December, 1975, to:

The Office of U.S. Attorney General
Washington, D.C.

LOUIS VERNELL, JR.